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No. 83-928

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SHIRLEY McGAUGHEY, a/k/a
SHIRLEY ZIGORIS and
GUY E. McGAUGHEY, JR. - - - Petitioners

vs.

MARK ZIGORIS - - - - - - - Respondent

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Jurisdiction	1– 3
Statement of the Case	3– 6
Argument	6–10
Conclusion	10

Appendix:

Exhibit 1 — Petitioner's Motion for Summary Judgment, Jefferson Circuit Court, Louisville, KY 80CI-06156 raising federal question of Full Faith and Credit in the first instance, August, 1980...11–15

TABLE OF AUTHORITIES

Constitutional Provisions:

PAGE

United States Constitution, Article 4 §1 2

Statutes:

Federal Statute: 28 U.S.C. §1257(3) 1
Federal Statute: 28 U.S.C. §§1738 2
Ill. Rev. Stats. 40, §601(a)(2), (3), 602 and 610(b)(2), (3) (1979) 7
Kentucky UCCJA, 9/15/80 K.R.S. 403.400-403.620 . 1, 2, 3, 6, 7, 8

Cases:

Coe v. *Coe*, 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451 (1948) 2, 10
Davis v. *Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26 (1938) 2, 10
Freeman v. *Freeman*, Ky., 547 S. W. 2d 437 (1977). 7
Goff v. *Goff*, Ky., 323 S. W. 2d 209 (1959) 7, 8
In Re Marriage of Hopson, 110 Cal. App. 3d 884, 168 Cal. Rptr. 345 (1980) 7, 8
Milliken v. *Meyer*, 311 U. S. 457, 462, 61 S. Ct. 339, 342, 85 L. Ed. 278, 282-83 (1940) 2, 9
New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63 (1928) 1, 3
Radio Station W.O.W., Inc. v. *Johnson*, 326 U. S. 120 (1945) 1, 3
Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 2d 1429 (1948) 2, 10
Sistare v. *Sistare*, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905 (1910) 2, 9
Webb v. *Webb*, 101 S. Ct. 1889 (1981) 1, 3
Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945) 2, 10
Wood v. *Graham*, 633 S. W. 2d 404 (1982) 7
Yarborough v. *Yarborough*, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269 (1933) 2, 9

REPLY TO ARGUMENTS FIRST RAISED IN RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petitioners respectfully submit their reply brief.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

The Respondent challenges this Court's jurisdiction on two points. (1) Custody only was raised in the Kentucky State Courts and no argument was presented or preserved for review in the Kentucky State Courts as to full faith and credit of an Illinois money judgment for accrued child support, citing *Webb* v. *Webb,* 101 S. Ct. 1889 (1981) and *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63 (1928) and/or (2) this case was decided in Kentucky on independent, adequate state law principles including the Uniform Child Custody Jurisdiction Act (UCCJA), not involving any federal questions, citing *Radio Station W.O.W., Inc.* v. *Johnson,* 326 U. S. 120 (1945).

As to the first challenge, we submit the *Webb* case requires the federal Full Faith and Credit claim to be raised in the Kentucky State proceedings and preserved for review.

Petitioner's Complaint in the Kentucky Trial Court did not seek Kentucky modification of custody as the parties and children were all non-residents of Kentucky. Rather, it sought enforcement against the Father, employed in Kentucky, of an accrued child

support order, the legal basis therefor being the Full Faith and Credit clause, Article 4, § 1 of the United States Constitution and 28 U.S.C. § 1738. Respondent tried to inject by Counterclaim a Request for Modification of Custody but this was denied by the Kentucky Trial Court because of the non-residence of the parties and children.

Respondent also advanced the theory Illinois subject matter jurisdiction could be collaterally attacked in Kentucky, basing his argument on the child abduction features of the UCCJA which was not in existence when the Illinois Court assumed jurisdiction. We attach as Exhibit 1 (pp. 11-15) to this Reply a copy of Petitioner's Motion for Summary Judgment filed in the Kentucky Trial Court, to which Respondent filed a Response. Exhibit 1 clearly argues, in the first instance, the applicability of the Full Faith and Credit clause of the United States Constitution and the non-applicability of the Kentucky UCCJA.

All briefs filed by the Petitioners in the Trial Court, the Appellate Court and the Supreme Court of Kentucky cited *Milliken* v. *Meyer, infra, Davis* v. *Davis, infra, Sherrer* v. *Sherrer, infra, Coe* v. *Coe, infra* and *Williams* v. *North Carolina.* In their Petition for Rehearing in the Appellate Court, Petitioners submitted the additional U. S. Supreme Court controlling cases of *Sistare* v. *Sistare, infra,* and *Yarborough* v. *Yarborough, infra,* as permitted under K.R.S. 76.32, where the Court has overlooked controlling decisions.

The Full Faith and Credit question was ruled upon by the Trial Court (Petitioner's App., p. 51), the Court of Appeals of Kentucky (Petitioner's App., p. 44), and the Supreme Court of Kentucky (Petitioner's App.,

p. 34) as well as the dissent of Justice Leibson and Justice Vance (Petitioner's App., p. 38).

Clearly, *Webb* v. *Webb, supra,* is inapposite because the federal issue was presented and ruled upon throughout the Kentucky State Courts. In *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63 (1928) the Court held the federal question had been preserved.

Respondent's second challenge is the instant case was decided on independent, adequate state law of principles, including the Kentucky UCCJA, not involving any federal question. Respondent cites *Radio Station W.O.W., Inc.* v. *Johnson,* 326 U. S. 120 (1945). That case involved the relation of the Federal Communications Act to the power of a state to adjudicate conflicting claims to the property used by a licensed radio station. This Court denied the challenge of jurisdiction, accepted jurisdiction, addressed the federal question and remanded the judgment of the Supreme Court of Nebraska, requiring it to withhold execution of that portion of the Nebraska decree requiring re-transfer of physical properties until steps were ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the radio station.

In the instant case, no federal agency is involved. This is a Full Faith and Credit Constitutional issue, which was not present in *Radio Station W.O.W., Inc.* v. *Johnson, supra.*

STATEMENT OF CASE

Respondent's statement of the case as to issues of *children* abduction, a Florida "hearing", and a Kentucky "hearing" are incredibly inaccurate and mis-

leading. He has also attempted to divert this Court's attention from the Father's drug abuse and parental misconduct by lightly brushing them from the record as "simply figments of the fertile imagination of the Petitioners".

At Page 5 of his Response, Father contends the Mother took possession of the *children* in contravention of the 1970 Indiana judgment and the 1973 Kentucky judgment. The Father's counsel knows there is not a scintilla of evidence in the record that Andre was abducted. The record is clear—after Andre overdosed and nearly killed himself on the Father's beer and Valium in the custodial home, the Father called a child psychologist who insisted Andre be given to the Mother immediately.

> "The Court: *Mr. Zigoris, did you agree to let Andre live with them?*
>
> Mr. Zigoris: *Yes, I did.*" (Petitioner's App., p. 70)

To like effect is Andre's testimony (Petitioner's App., p. 69).

Respondent would lead this Court to believe that there was a hearing in Florida, when in fact, there was no hearing. Judge Dykes overruled an order of temporary custody awarded by another Florida judge to the Mother of both children, heard no testimony and summarily ordered Alexia, not Andre, be sent to Indiana without giving any consideration to changed circumstances, the drug abuse of the Father, or his parental neglect and misconduct.

Fortunately to the contrary, the Illinois Trial Judge quickly recognized there were changed circumstances since the 1973 Kentucky Judgment, and that there had

been no hearing as to the Father's misconduct or the present welfare of the children.

> *The Court:* "Where it appears that there has been no full hearing where all the parties have been present, including the children, then they do not grant full faith and credit, and *it appears from the pleadings and all the records here that perhaps no complete hearing has been held in this matter.*" (Petitioner's Petition, p. 3, R-168)

Illinois Judge Whitmer had verified pleadings, the parties, the children, counsel and witnesses before him when he granted temporary custody to the Mother December 18, 1978, as formalized by a written order in February 1979.

Respondent contends the Kentucky Trial Court who was simply requested to enforce the Illinois Support Order under Full Faith and Credit heard testimony of the parties. It is respectfully submitted there is nothing in the record to show testimony of the parties, nor does such testimony exist.

Finally, Respondent characterizes the Father's drug abuse and parental misconduct and neglect as "simply figments of the fertile imagination of the Petitioners."

Can the Respondent in this Court, the Highest Court of our Land, seriously deny the Father's possession of over a pound of marijuana (10/31/76) when the Indiana judge admitted he had prior knowledge of the marijuana under the Father's bed (Petitioners' App., p. 69) and Andre so testified while his Father sat in silent acquiescence in open court (Petitioner's App., p. 69).

Can this Respondent seriously deny the Father's continued use of marijuana and excessive Valium in

the custodial home over a period of years? (see Andre's testimony, Petitioner's App., p. 70) and Andre's undenied affidavits, Petitioner's App., pp. 71-76).

Can this Respondent seriously deny Andre nearly killed himself from an overdose of his Father's Valium and beer in the custodial home in the fall of 1977? (see Andre's testimony, Petitioner's App., p. 68 and Andre's affidavits, undenied, Petitioner's App., pp. 71-76). Apparently counsel for Respondent would lead this Court to believe the life threatening episode of this little boy was not an emergency. Should the Mother wait for a subsequent, more severely drug induced suicidal attempt?

Can this Respondent seriously deny the obvious mental and physical devastation the Father's drugs caused Andre culminating in Andre being admitted to a chemical dependency center in Minneapolis, Minnesota for four months in 1979? (see Hospital Invoices, Petitioner's App., p. 85)

This undenied testimony, these uncontradicted affidavits and hospital invoices are just some of the mountainous, cumulative evidence in the record which leads to the inescapable conclusion they are not figments of anybody's fertile imagination. They are undenied facts, fully corroborated and supported by the record and the testimony in this case.

ARGUMENT

Respondent, at pages 10 and 11, concedes that Section 8 of the UCCJA (Child abduction) applies only where the Court otherwise has jurisdiction to modify a custody decree and that the Kentucky Courts did not have jurisdiction to modify the Illinois judgment.

Respondent then posits the argument that the Illinois judgment is improper under the standards of the Uniform Act, which was not in existence at the time the Illinois Trial Court assumed subject matter jurisdiction. In other words, the Illinois Court should have applied a statute not before him. The incongruous position of this argument answers itself.

Respondent then cites *Freeman* v. *Freeman,* Ky., 547 S. W. 2d 437 (1977); *Wood* v. *Graham,* Ky., 633 S. W. 2d 4040 (1982); *in Re Marriage of Hopson,* 110 Cal. App. 3d 884, 168 Cal. Rptr. 345 (1980); and *Goff* v. *Goff,* Ky., 323 S. W. 2d 209 (1959).

We submit that all of these cases are inapposite not only to Respondent's argument but also to the facts in this case.

Wood v. *Graham, supra.* Two days prior to the filing of the Petition for Dissolution of Marriage and custody of the child, the Father, a Kentucky resident, brought the child to Kentucky. The Kentucky Supreme Court held Kentucky did not have jurisdiction, the Father had not met the jurisdictional aspects of the UCCJA which requires six months residence. *Wood* was a modification of custody case, which is not the issue here. None of the parties or the children are residents of Kentucky.

Freeman v. *Freeman, supra.* The issue in *Freeman* was whether Kentucky had jurisdiction based on the Mother's attempted residence in Kentucky. *Freeman* is inapposite as all parties in this case are non-residents of Kentucky.

In Re Marriage of Hopson, supra. The California Court concluded it was the proper forum under the UCCJA to determine the best interests of the children

and ignored prior Arizona and Tennessee decrees. The Court acknowledged it was not dealing with a parent's child abuse, but merely with the desires of the children. The *Hopson* case is inapplicable because the instant case is not a custody modification case, the parties being non-residents of Kentucky, no Kentucky decree being involved, and Kentucky not being a forum for the future welfare of the children.

Goff v. *Goff, supra*. *Goff* is a Kentucky modification case concerning Kentucky parties and involves no Full Faith and Credit question.

Respondent persists in dragging a red herring into these proceedings, to-wit, the application of the UCCJA, which was not in existence in Illinois at the time Illinois assumed jurisdiction and is inapplicable here.

The Kentucky UCCJA, inescapably has no application because (1) the child abduction features of Section 8(b) do not come into operation unless there is a custody modification issue before the Kentucky Court; (2) when child abuse is involved the emergency exception recognized by the UCCJA overrides the child abduction features—Section 8(b) starts with "unless required in the interests of the child" and (3) a state cannot legislate into law Full Faith and Credit, or the denial thereof, which is solely within the province of the U. S. Supreme Court and Congress.

It is submitted the Respondent not only persists in this red herring argument, but tries to stretch it into a factual situation which obviously does not exist—arguing Andre, by implication of the word "children," was abducted. Respondent knows this isn't true and that the record overwhelmingly establishes a classic

case of drug abuse by the Father culminating in his minor son's hospitalization for drug addiction caused by the father's use of illegal marijuana and excessive valium.

Finally, Respondent, in this Court and all other Courts, has failed to distinguish the controlling decisions of the U. S. Supreme Court or to cite any U. S. Supreme Court cases holding Full Faith and Credit should not be given to the Illinois judgment in this case by the Kentucky Courts.

Simply stated, the Illinois judgment was based on in personam jurisdiction. It is final and non-modifiable. It cannot be collaterally attacked by a Kentucky Court.

This U. S. Supreme Court has ruled accrued child support judgments are entitled to mandatory Full Faith and Credit as a matter of federal law, *Sistare* v. *Sistare,* 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905 (1910) and *Yarborough* v. *Yarborough,* 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269 (1933).

This U. S. Supreme Court has directly ruled the Full Faith and Credit clause of the Constitution precludes any inquiry into the merits of the cause of the action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Milliken* v. *Meyer,* 311 U. S. 457, 462, 61 S. Ct. 339, 342, 85 L. Ed. 278, 282-83 (1940).

Jurisdiction of the subject matter in the Illinois decree is not subject to collateral or appellate attack by a sister state when (1) there is an in personam judgment in Illinois; (2) the parties appeared by counsel and in person; and (3) the subject matter of Illinois jurisdiction was contested and fully litigated

both at the trial level and the appellate level in Illinois. *Davis* v. *Davis,* 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26 (1938); *Sherrer* v. *Sherrer,* 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 2d 1429 (1948); *Coe* v. *Coe,* 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451, (1948); *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945).

CONCLUSION

Petitioner requests a Writ of Certiorari be granted and a summary disposition by this Court reversing the decision of the Kentucky Supreme Court and remanding it with directions to enter an order recognizing the Illinois child support order.

Respectfully submitted,

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APPENDIX

EXHIBIT 1

JEFFERSON CIRCUIT COURT

SECOND DIVISION (2)
COMMONWEALTH OF KENTUCKY

No. 80 CI-06156

SHIRLEY ZIGORIS MCGAUGHEY,
GUY E. MCGAUGHEY, JR., - - - - - *Petitioners,*

v.

MARK ZIGORIS, - - - - - - - *Respondent.*

MOTION FOR SUMMARY JUDGMENT ON PETITION

Comes now the Petitioners by Counsel and moves for a Summary Judgment on the Petition, filed herein, and the Response thereto and in support thereof shows the Court as follows:

1. Notwithstanding the allegations in Respondent's Response filed herein, Mark Zigoris was served personally in the State of Illinois on the 19th day of August 1978 by the Sheriff of Lawrence County, Illinois. This is not a case of a non-resident being served outside the State of Illinois or by publication or mail. Mark Zigoris, Respondent herein, was served in Lawrence County, Illinois; personal jurisdiction of the Illinois Court was obtained thereby. An authenticated copy of the Summons is attached hereto as Exhibit A and *must be accorded full faith and credit under the applicable statutes and the Constitutions of the U. S. Government, Kentucky and Illinois.*

2. That the Defendant Mark Zigoris appeared personally in 1978 in the courtroom before Judge Robert Whitmer in Lawrence County, Illinois with his attorney, Mr. Robert Douglas, and raised the question of whether or not the Illinois Court had the power under its applicable statutes

to assume jurisdiction of the custody of the children, and modify the outstanding Decree in Indiana. The Court held that Mark Zigoris was before the Court in personam and that the Court had, as a result of his being served in Illinois, further jurisdiction to modify the custody decree of the State of Indiana as to two minor children, Andre Zigoris and Alexia Zigoris, who were residents of Illinois.

3. That Mark Zigoris, through his attorney, applied for a Certificate of Importance on the question of jurisdiction of the Lawrence County, Illinois Circuit Court awarding custody to the mother, Shirley Zigoris McGaughey whereupon the Lawrence County Circuit Court granted said Certificate in order for Mark Zigoris to appeal the question of jurisdiction of the custody to the Appellate Court of the Fourth District of the State of Illinois. The Appellate Court of the Fourth District of the State of Illinois affirmed the decision of the Lawrence County Circuit Court stating that the Circuit Court acted properly and the Illinois Court did have jurisdiction to modify the custodial decree. There was no question as to its having had personal jurisdiction of Mark Zigoris because he was served with summons in Illinois.

4. At a hearing on the question of support payments, Mark Zigoris appeared through his new Counsel, Irving Wiseman, of Alton, Illinois and stated that there was no in personam jurisdiction because Mark Zigoris was a non-resident. The Circuit Court promptly dismissed and denied this argument of Mark Zigoris because even though he was a non-resident of the State of Illinois, he was personally *served within the confines of Illinois.* Non-resident statutes are not applicable in situations where Mark Zigoris was served *in* the State of Illinois.

5. After notice to Mark Zigoris, a hearing was held on the question of custody payments and an award was entered. Mark Zigoris refused to attend the Court's session and was found to be in contempt of Court and an attachment has been issued for picking up Mark Zigoris and bringing him before the Lawrence County Circuit Court of

the State of Illinois. These *decrees are entitled to full faith and credit by* the Jefferson Circuit Court or any other Court in this land. Authenticated copies of these decrees and the supporting docket sheet are attached as Exhibits B, C and D.

6. Respondent is attempting in his Response filed herein to re-open the question of custody by this Kentucky Court but the question of custody is not and cannot be open for consideration by the Jefferson Circuit Court for the following reasons, to-wit:

a. The father and the mother are not residents of the State of Kentucky. The mother is a resident of the State of Illinois and the father is a resident of the State of Indiana.

b. The two minor children whose custody has been awarded to the mother by the Illinois Courts have lived in Illinois for more than two years and are residents of the State of Illinois and have been residents for more than two years. They are not residents of the State of Kentucky.

c. Absent the residence of the mother, the father and the children in Kentucky, *there is no way the Uniform Custody Act can be invoked in this case because the jurisdictional requirements provided in the Uniform Child Custody Act as enacted by the Kentucky legislature to modify a decree of Illinois Courts are absent.*

d. This Court does not have appellate jurisdiction over the Circuit Court of Lawrence County, Illinois, or the Appellate Court of Illinois.

7. That the Court should proceed without delay to enforce the orders of the Circuit Court of Illinois because of the following reasons:

a. The father introduced drugs to his infant nine year old son whereby the son became addicted, a user

and even a dealer in drugs which is the reason for the father having given voluntary custody of the child to the mother at the command of an attending child psychologist.

b. That the child has been taken by the mother to a drug center in Minneapolis, Minnesota for treatment of a drug problem which the father caused. The Court decree of the State of Illinois provides that the father should pay the hospital bill in Minneapolis, Minnesota.

c. The father has not, for more than two years, contributed one cent to the clothing, medical care, food or any other necessities of the children.

d. That to delay this case any further would be an injustice to the children because the father is trying to abandon his duty to support the children through various legal maneuvers which have all failed. This one has to fail also.

This Petitioner therefore summarily moves that this Court enter judgment on the foreign judgment as set forth so the interests of the children will no longer be put in jeopardy and that the orders of the Circuit Court of Lawrence County, Illinois be placed on record as a foreign judgment so collection proceedings may be pursued. *Mark Zigoris is chairman of a dental department of the University of Louisville, he has a private dental practice, he has recently married, he has a new home, he has bought a new car, but nowhere in his pocketbook or in his heart can he find any money, not one red cent, to support his children.*

There need be no further delay in the enforcement of this judgment.

As to the issues of his being reimbursed for attorney's fees, which he has incurred, it is the position of the Petitioner that if that is a triable issue, then the mother is entitled to amend her pleadings and to a trial on the reimbursement of more than $65,000.00 worth of attorney's fees which she has incurred in protecting the health, the welfare and the best interests of the children. The issue of

attorney's fees has nothing to do with the father supporting his children promptly and should not prejudice or delay a summary judgment *on the orders of the Illinois Court for support payments to his two minor children which are entitled to full faith and credit* by this Kentucky Court.

There is no genuine issue as to any material fact that Mark Zigoris was served personally in Illinois, he has had *his* day in Court there and the moving party is entitled to a judgment as a matter of law. Affidavits are attached.

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